SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. VERNA L. SAUNDERS** **PART** **IAS MOTION 36**

Justice

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INDEX NO. 150401/2018

KAYLA PEDRAZA,

Plaintiff,

MOTION SEQ. NO. 002

- v -

760 8th AVE REST. INC. d/b/a COPACABANA, 268 WEST 47th REST. INC. d/b/a COPACABANA,

Defendants.

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73

were read on this motion to/for **SUMMARY JUDGMENT**.

Plaintiff commenced this personal injury action alleging that, while a patron of Copacabana Nightclub, she slipped and fell due to "wetness and ice on the floor" and suffered a severe ankle fracture. Defendants move the court pursuant to CPLR § 3212 seeking summary judgment dismissing the complaint arguing that plaintiff cannot establish a *prima facie* claim of negligence insofar as she cannot identify the cause of her fall or demonstrate that defendants had any notice of the alleged unobserved condition. Plaintiff opposes the motion arguing that defendants had notice of the recurrent dangerous condition that they created.

Plaintiff asserts that on May 28, 2017, she was a patron in defendant's nightclub for several hours and observed defendant's employees serving patrons drinks which were permitted to be carried onto the dance floor. Plaintiff further asserts that patrons routinely spilled drinks onto the dance floor, yet no one was observed inspecting or cleaning spills throughout the night. Plaintiff avows that while on the dance floor she stepped forward onto ice and liquid, slipped and fell, injuring her ankle.

Defendants contend that inasmuch as plaintiff cannot identify the cause of her fall, her claim must fail. Specifically, defendants refer to plaintiff's deposition testimony wherein she testifies that she believed she fell on ice and liquid but never observed ice, liquid, or anything on the floor before or after her fall. Defendants aver that plaintiff's failure to identify ice, liquid, or any defect/condition on the floor is consistent with the observations of security manager, Edwin Hernandez, who inspected the area when he began assisting plaintiff after she fell. (*Hernandez Aff, Exhibit 5, ¶ 5-6*). Notwithstanding plaintiff's inability to identify the cause of her fall, defendants argue that as neither plaintiff nor the security manager observed the alleged condition before or after plaintiff's fall, plaintiff is unable to establish that defendant had constructive notice of any condition thus summary judgment is warranted. Furthermore, defendants annex a closed-circuit television recording of the incident depicting plaintiff falling after swaying and losing her balance while talking with other patrons on the dance floor. (*Carrasco Aff, Exhibit 4*).

In opposition, plaintiff avers that defendants created the dangerous condition causing her fall by allowing patrons to carry drinks onto the dance floor rather than restricting drinking to the bar or table areas and by failing to have periodic inspections and cleanings of the spills. Plaintiff further asserts that defendants were on actual notice of the recurring condition of customers spilling drinks. Plaintiff further argues that the instant motion fails to refute the allegations of negligence and recurring dangerous conditions despite defendant's assertion in its Bill of Particulars that the alleged dangerous condition was open and obvious.

A movant seeking summary judgment in its favor must make *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." (*See Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). The evidentiary proof tendered must be in admissible form. (*See Friends of Animals v Assoc. Fur*

Manufacturers, 46 NY2d 1065 [1979]). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). The proof raised by the opponent to the motion "must be sufficient to permit a finding of proximate cause 'based not upon speculation, but upon a logical inference to be drawn from the evidence.'" (*Robinson v City of New York*, 18 AD3d 255 [1st Dept 2005], quoting *Schneider v Kings Highway Hops. Ctr.*, 67 NY2d 743 [1986].)

In an action for negligence, a plaintiff must prove that the defendant owed him a duty to use reasonable care, that the defendant breached that duty and that the plaintiff's injuries were caused by such breach (*Akins v Glens Falls City School Dist.*, 53 NY2d 325, 333 [1981]). A motion for summary judgment may be properly granted when a defendant demonstrates that it did not create or have actual or constructive notice of an alleged defective condition which allegedly caused plaintiff's fall. (*Rodriguez v New York City Tr. Auth.*, 118 AD3d 618 [1st Dept 2014]).

To constitute constructive notice, a defect must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit defendants' employees to discover and remedy it to correct or warn about its existence (*Lewis v Metro. Transp. Auth.*, 64 NY2d 670, 670 [1984]; *Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). Additionally, neither a general awareness that a dangerous condition may be present nor the observation of a condition in another area is sufficient to create constructive notice (*id.* at 838 [internal citations omitted]).

Here, in the video annexed to the moving papers, plaintiff can be seen standing on the dance floor and repeatedly leaning forward to speak with another patron. Each time, plaintiff appears to be slightly swaying before leaning forward and holding on to the patron before

speaking. On her third time leaning forward to speak, she can be observed with one foot on the ground and one foot in the air. As she leans forward in this manner, again holding on to the other patron, she is seen losing her balance then attempting to regain her balance by placing her foot on the floor but instead plaintiff trips on the other patron's foot and falls onto the floor. Despite the attempts of neighboring patrons to break her fall, plaintiff ultimately lands on the dance floor. In the video, no wet substances can be seen on the floor in the vicinity of her fall, despite plaintiff's bald assertions to the contrary. Moreover, the opposition papers are silent and fail to address the video footage in any way.

Based upon the admissible evidence submitted, the court finds that defendants have demonstrated that they did not create or have actual or constructive notice of a dangerous condition contributing to plaintiff's accident and thus, plaintiff has failed to establish a prima facie case and it is hereby

ORDERED that defendants 760 8th Ave Rest, Inc. d/b/a Copacabana and 268 West 47th Rest, Inc. d/b/a Copacabana's motion for summary judgment is granted and the complaint against said defendants are dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly and the action is hereby dismissed.

November 23, 2020

HON. VERNA L. SAUNDERS, JSC

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[X]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE